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THE CONSTITUTIONALIZATION OF CONTRACT LAW: Something New under the Sun?

Olha Cherednychenko¹

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Abstract

Due to the sharp analytical and historical distinction between private and public law, which is common in European legal systems, contract law has traditionally been considered to be immune from the effect of constitutional rights. This traditional view has, however, been put under pressure as a result of the tendency towards the so-called constitutionalization of contract law. The idea behind this development is that contract law is not an autonomous system for dispensing justice between private parties, but that it is subordinate to the value system of the Constitution. As a result of this, the role of constitutional rights, which were conceived as an instrument for the protection of the individual against the power of the State, is no longer limited to this kind of relationship. Contractual relations have been losing their immunity from the effect of constitutional rights. In this article, an attempt is made to explain what the constitutionalization of contract law actually entails and to assess the desirability of this development. The central question to be discussed is whether by the use of constitutional rights in contract law something substantially new can be gained for the protection of the weaker contractual party in comparison with the well-established contract law concepts such as duties to inform. The answer to this question will become crystallized in the course of analysing three cases which arose in three different legal systems at the beginning of the 1990s and in which the same results were attained, though in different ways, i.e. the famous German *Bürgschaft* case, on the one hand, and the English *O'Brien* and the Dutch *Van Lanschot Bankiers v Bink* cases, on the other.

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1. Introduction

Constitutional rights and contract law - these notions, which were originally considered to be far apart from each other due to the sharp analytical and historical distinction common in European legal systems between public and private law, have recently started to move towards each other with increasing speed. The role of constitutional rights, which were conceived as an instrument for the protection of the individual against the power of the State, is no longer only limited to this kind of relationship. Purely private law relations, including contractual relations to which the State is not itself a party, have been rapidly losing their immunity from the effect of constitutional rights.

The constitutionalization of contract law is a part and an inevitable consequence of the general phenomenon of the constitutionalization of private law - the topic which has been most widely debated in Germany by both public and private lawyers. However, not only the minds of German lawyers have been preoccupied with this issue. Lawyers in other countries, following the developments in Germany, have also become concerned. One Dutch lawyer, M.B.W. Biesheuvel, expressed a rather pessimistic view on this problem. He describes its tragedy as follows: 'If one writes about the horizontal effect of constitutional rights from a public law perspective, the aspects are described so theoretically that civil law lawyers tend to give up on the exercise. And if the latter dare to embark upon this issue, then the principal aspect will remain underexposed.'²

What can be done in order to avoid the tragedy as signalled by Biesheuvel? In my view, it could make things at least much clearer for both public and private lawyers if one were to ask oneself whether, to use the words of the famous English saying, there is something new under the sun in the constitutionalization of contract law. However general it may seem at first sight, it is this very question which I would like to address in this paper. In order to provide an illustration of what is involved here, I will discuss three cases which have arisen in three different legal systems during nearly the same period of time and which are of

² M.B.W. Biesheuvel, 'Fundamentele rechten in burgerlijke zaken', 70 *Nederlandsch juristenblad* 22 (1995), 822 (my translation).

particular importance to the present issue.

2. Different solutions to the same problem

On 19 October 1993, the German Constitutional Court (*Bundesverfassungsgericht*) delivered an interesting judgment in the *Bürgschaft* case.³ In that case, a bank had offered a businessman a loan of DM 100,000 on the condition that the businessman's daughter would sign the contract as a surety. Prior to the signing, the bank employee told the daughter: 'Would you just sign this here, please? This won't make you enter into any important obligation; I need this for my files.' The daughter, who was 21, uneducated, unemployed and without any property, accepted to act as a guarantor for the whole of her father's debt. Four years later, the father's business experienced financial difficulties and the bank claimed DM 100,000 with interest, amounting to a total of DM 160,000, from the daughter under the original contract.

By the time the case had reached the *Bundesverfassungsgericht*, the daughter was a single mother without an income. In the courts her defence met with alternating success. While the *Landesgericht* held that the contract was valid and ordered her to pay, the *Oberlandesgericht* maintained that the bank employee had violated his duty to inform the daughter. This decision was overturned by the *Bundesgerichtshof*, which did not accept such a duty, reasoning that any person of age knows that signing a suretyship entails a risk. The father was solvent at the time of signing and therefore the information provided by the bank was correct.

However, this was not the end of the matter. The daughter appealed to the *Bundesverfassungsgericht* and claimed that the *Bundesgerichtshof*, through its decision, had violated her right to dignity (Article 1(1) of the German *Grundgesetz* (GG)) and party autonomy (Article 2(1) of the GG) in conjunction with the principle of the social state (Article 20(1) and Article 28(1) GG). Her constitutional claim was successful. According to the *Bundesverfassungsgericht*, in cases where a structural imbalance of bargaining power has led to a contract which is exceptionally onerous for the weaker party, the civil courts are obliged to intervene on the basis of the general clauses (§ 138(1) and 242 of the *Bürgerliches Gesetzbuch* (BGB) concerning, respectively, good morals and good faith). This obligation is based on their duty to protect the basic right to party autonomy in conjunction with the principle of the social state. In the case at hand, a contractual imbalance existed because the bank had failed to sufficiently inform the daughter about the risk relating to the surety, although the risk was relatively high compared to her income.

This case represents one of the most famous examples of the effect of constitutional rights on private law and is widely believed to have far-reaching consequences as far as the law of contracts is concerned. Far less famous, however, are similar 'surety' cases which have arisen in other jurisdictions and in which similar results were reached, though in different ways.

³ BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

Thus, in *Barclays' Bank plc v. O'Brien* (the *O'Brien* case),⁴ in which a wife had charged the matrimonial home to secure her husband's business debts, the House of Lords prevented the bank from enforcing the charge on the following ground. The bank knew that the debtor and the surety were in the kind of relationship in which misrepresentation, undue influence or duress was likely and it also knew that the transaction was not to the wife's advantage. Unless under these circumstances it had satisfied itself that the practical implications of the proposed transaction had been brought home to the wife, the bank would be fixed with constructive notice of any wrong by the husband, i.e. the notice the bank has of the husband's impropriety, whether undue influence or misrepresentation, that creates the wife's right to set aside the transaction. Due to this oversight, the bank had not advised the wife to take independent advice and, as the husband had misrepresented the effect of the charge as being for a limited amount when in fact it was unlimited, the charge was unenforceable.

In the Netherlands, the same type of case is exemplified by the *Van Lanschot Bankiers v Bink* case,⁵ in which the Dutch Supreme Court (*Hoge Raad*) had to deal with the situation where a mother had provided surety in order to enable her son to obtain credit for his business. In this case, the *Hoge Raad* laid down a rule according to which a bank, as a professional credit supplier, is under a duty to inform a non-professional party of the risks involved in providing a surety.

What can be seen in these two cases is that relief for the weaker party can be granted not only on the basis of constitutional rights, but also on the basis of duties to inform of a private law character which were also at stake in the subsequently overturned judgment of one of the lower German courts in the *Bürgschaft* case.

3. Two parallel tendencies in modern private law

The three cases described above illustrate two tendencies which can nowadays be traced in modern private law. On the one hand, the growing effect of constitutional rights on private law,⁶ in particular in the field of contract law, which is illustrated by the German case, makes

⁴ [1994] 1 AC 180.

⁵ HR 1 June 1990, *NJ* 1991, 759.

⁶ Many authors have remarked upon the events that are taking place in this field and have speculated on future developments. For the Netherlands, see, for instance, E. Hondius, 'Open normen en grondrechten', 125 *Weekblad voor privaatrecht, notariaat en registratie* 6146 (1994), 535; M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht* (doctoral thesis, Utrecht; Deventer: Kluwer, 1999), 45; J.H. Nieuwenhuis, 'De Constitutie van het burgerlijk recht', *Rechtsgeleerd magazijn Themis* 6 (2000), 203; F.W. Grosheide, 'Constitutionalising van het burgerlijk recht?', 3 *Contracteren* 1 (2001), 48. For Germany, see, for example, C. Starck, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court' and A. Heldrich and G.M. Rehm, 'Importing Constitutional Values through Blanket Clauses', in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law*, (Oxford/Portland, Ore., Hart Publishing, 2001), 97 and 113 with further references. For the UK, see, for example, H. Beale and N. Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' and R. Ellger, 'The European Convention of Human Rights and Fundamental Freedoms and German

it possible to speak about the tendency towards a so-called ‘constitutionalization of private law’. The idea behind this development is that private law is not in itself a closed system for the regulation of private relationships, but that it is totally subordinate to the value system of constitutional rights. As a result of this tendency, the sharp analytical and historical distinction made in European legal systems between public and private law is put under pressure.

On the other hand, the Dutch and English cases provide evidence that within private law itself one can speak of the tendency towards a more society-oriented private law which manifests itself in the growing protection of the weaker party, in particular in contract law.⁷ The idea behind this development is that a party, in different phases of the contract’s life, should no longer be guided only by his or her own interests, but also by the justified interests of the other party. In other words, the party is no longer only responsible for him or herself, but also for the other party. In this context, some authors even speak of a so-called ‘consumerization’ of private law in contrast to its commercialization.⁸ Among the main indicators of this tendency is the development of various duties to inform not only in consumer law, but also in general contract law on the basis of the principle of good faith.⁹ Such an attitude towards the other contracting party would have been unthinkable in the 19th century, when the prevailing doctrine of *laissez-faire*, presupposing the idea of unlimited self-reliance, made it possible, as is said in English, to ‘buy a pig in a poke’.

4. The constitutionalization of contract law: What is this all about?

It appears to be clear from the foregoing that both tendencies aim to achieve an adequate level

Private Law’, in Friedmann and Barak-Erez, *Human Rights in Private Law*, 131 and 161 with further references.

⁷ Several authors have highlighted this development. For the Netherlands, see, for example, J.H. Nieuwenhuis, ‘Contractvrijheid, een weerbarstig beginsel’, in T. Hartlief and C.J.J.M. Stolker (eds.), *Contractvrijheid*, (Deventer: Kluwer, 1999), 23, at 27; E. Hondius, ‘De zwakke partij in het contractenrecht. Over de verandering van paradigma van het privaatrecht’, in Hartlief and Stolker, *Contractvrijheid*, 387; N.J.H. Huls, ‘Sterke argumenten om zwakke contractpartijen te beschermen’, in Hartlief and Stolker, *Contractvrijheid*, 395; S.D. Lindenbergh, ‘Bescherming van de “zwakkere”. Regel en uitzondering’, in Hartlief and Stolker, *Contractvrijheid*, 405; J.B.M. Vranken, ‘Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht’, in J.M. Barendrecht, M.A.B. Chao-Duvis and H.A.W. Vermeulen (eds.), *Beginselen van contractenrecht. Opstellen aangeboden aan B.W.M. Nieskens-Isphording* (Deventer: W.E.J. Tjeenk Willink, 2000), 153; Grosheide, ‘Constitutionalisering van het burgerlijk recht?’, T. Hartlief, ‘Vrijheid en bescherming in het contractenrecht’, 5 *Contracteren* 1 (2003), 5. For Germany see, for example, W. Zöllner, ‘Die Politische Rolle des Privatrechts’, 28 *Juristische Schulung* 5 (1988), 329, with further references. In general, see, for instance, P.S. Atiah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979); J. Beatson and D. Friedmann, ‘Introduction: From “Classical” to Modern Contract Law’, in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press, 1995), 3.

⁸ R.P.J.L. Tjittes, ‘Naar een bijzonder contractenrecht voor ondernemers’, in S.C.J.J. Kortmann et al. (eds.), *Onderneming en 5 jaar nieuw burgerlijk recht* (Deventer: Kluwer, 1997), 377.

⁹ See J.B.M. Vranken, *Mededelings-, informatie- en onderzoeksplichten in het verbintenissenrecht* (Zwolle: W.E.J. Tjeenk Willink Zwolle, 1989) with the main focus on the Netherlands; Hesselink, *De redelijkheid en billijkheid*, chapter 3 including the developments in other European countries as well.

of protection for the weaker party. What is not clear, however, is how they relate to each other. Many authors have recognized the existence of these tendencies in general or with regard to a particular legal system.¹⁰ However, the striking feature of the existing literature is that, except in a few instances,¹¹ in most cases the two tendencies are dealt with separately. As a consequence, at present it is not very clear what the practical benefits are of the constitutionalization of contract law for the protection of the weaker party in comparison with the solutions provided by the concepts that are already well established in contract law.

Accordingly, the question which one may ask in order to discover this is what the constitutionalization of contract law is all about: is it a mere transformation of contract law issues into constitutional law issues or is it a more substantial transformation? In other words, the question which arises is whether, in the process of constitutionalization, contract law concepts are merely replaced by constitutional concepts with the same meaning and thus, here, there is really nothing new under the sun, or whether there are constitutional values which do not exist in contract law at present and should be introduced therein in order to ensure the protection of the weaker party.

In the light of this, it appears interesting to return to the three cases once again and to look more closely at the reasoning employed by the judges in the three different legal systems.

5. The *Bürgschaft* case: A top-down approach by the German Constitutional Court

5.1 From the theory of indirect effect of constitutional rights in private law indirectly to the theory of direct effect?

The official position of the *Bundesverfassungsgericht* regarding the way in which constitutional rights should affect private law was expressed in its decision in the *Lüth* case.¹² Considering the general question whether constitutional rights are applicable in private law, the Court remarked that it was confronted with two ‘extreme’ positions;¹³ the first was the view that public and private law are two distinct systems and, therefore, that public law in general and constitutional law in particular have no bearing on private law.¹⁴ The second, ‘extreme’ view was a diametrically opposed position. Before the *Lüth* case, a number of scholars had advanced the view that the most important basic rights are not only directed against the state, but are also fully and ‘directly’ applicable among individuals in private relationships. The implication of this theory was that certain constitutional rights should

¹⁰ See *supra* notes 6, 7.

¹¹ For the Netherlands, see, for instance, Grosheide, ‘Constitutionalisering van het burgerlijk recht?’.

¹² BVerfG 15 January 1958, BVerfGE 7, 198 (*Lüth*).

¹³ BVerfG 15 January 1958, BVerfGE 7, 198 (*Lüth*), at 204.

¹⁴ See, for example, H. von Mangoldt, F. Klein & C. Starck, *Das Bonner Grundgesetz* (3d edn., München: Vahlen, 1985), 136 (constitutional framers’ view of civil law).

ordinarily be binding on individuals and private groups in approximately the same manner and to the same extent as they apply to the government.¹⁵

Having taken note of both of these ‘extreme’ positions’, the Court, however, did not adopt either of them, but rather opted for an intermediate theory, which permitted only a certain degree of constitutional control over the relations of private law. According to the Court, basic rights are primarily to protect the citizen against the state, but as enacted in the *GG* they also incorporate an objective scale of values which apply, as a matter of constitutional law, throughout the entire legal system. A certain intellectual content flows from constitutional law into private law and affects the interpretation of existing civil norms, especially general clauses in the *BGB* such as § 242 (the duty of good faith), § 138(1) (nullity of agreements infringing good morals) and § 826 (wilful damage contrary to public policy), but it is nonetheless the civil law rules that are ultimately applied. Even in such cases, the Court emphasized, the dispute ‘remains substantively and procedurally a civil law dispute’.¹⁶ In reaching this conclusion, the Court adopted what has to be called the doctrine of the ‘indirect’ effect of constitutional values on private legal relations¹⁷ - as opposed to the theory of ‘direct’ effect mentioned above.

Thus, the main distinction officially drawn by the *Bundesverfassungsgericht* is that between the direct and the indirect approach. The main difference between the two lies in the fact that while in the former case a private party has, in his action against another private party, a claim or a defence which is directly based on a constitutional right which overrides an otherwise applicable rule of private law, in the latter situation, the claim or defence is based on a provision in the Civil Code, e.g. on a general good faith clause in contract law cases or on a provision for liability in tort law cases, which is interpreted in the light of the constitutional right in question. As a result, under the indirect approach private law values should retain considerable potency when confronted with public values of constitutional law and, formally, the distinction between private law and public law is therefore preserved.

However, in practice it is highly questionable whether the *Bundesverfassungsgericht* still follows the theory of indirect effect of constitutional rights in private law. The rule which it established in the *Bürgerschaft* case makes it clear that *civil courts are obliged to protect a constitutional right to party autonomy in conjunction with the principle of the social state* and hence to exercise control over the content of a contract. If the content of the contract is exceptionally onerous for the weaker party the courts are obliged to intervene *within the*

¹⁵ See L. Enneccerus and H.C. Nipperdey, *Allgemeiner Teil des bürgerlichen Gesetzbuchs* (15th edn., Tübingen: Mohr-Siebeck, 1959, § 15 IV 4; other proponents of this theory are W. Leisner, *Grundrechte und Privatrecht* (München: C.H. Beck, 1960), 365; F. Gamillscheg, ‘Die Grundrechte im Arbeitsrecht’, 164 *Archiv für die civilistische Praxis* 4 (1964), 419; E. Steindorff, *Persönlichkeitsschutz im Zivilrecht* (Heidelberg: Müller, 1983), 12.

¹⁶ BVerfG 15 January 1958, *BVerfGE* 7, 198 (*Lüth*), at 205.

¹⁷ For the proponents of this theory see, for example, G. Dürig, ‘Grundrechte und Zivilrechtsprechung’, in T. Maunz (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung. Festschrift zum 75. Geburtstag von Hans Nawiasky* (München: Isar-Verlag, 1956), 157; G. Dürig, ‘Zum “Lüth-Urteil” des Bundesverfassungsgerichts vom 15.1.1958’, in *Die öffentliche Verwaltung* (1958), xi, no. 8, 9, 184.

framework of the general clauses of the civil law in force.¹⁸ In that way, the *Bundesverfassungsgericht* followed the new theory of so-called *grundrechtlicher Schutzpflicht*, which has been defended by Canaris¹⁹ and which was first introduced by the Court in the *Handelsvertreter* case.²⁰ The change in the relationship between constitutional rights and the State is quite striking: while constitutional rights were originally conceived as defences against the State, now they are supposed to be protected by the State, i.e. by all its bodies including the civil courts. As a consequence, now in German private law the State has an obligation to protect the constitutional rights of individuals from encroachment by other individuals - an obligation which is no different from the one which is incumbent on the State in public law, in particular in criminal law.²¹

Although the *Bundesverfassungsgericht* did not formally reconsider the theory of the indirect effect of constitutional rights (as it referred to the existing general clauses of civil law), by imposing on the civil courts an obligation to protect constitutional rights, in reality it reached the same results which are comparable to that of the theory of direct effect.²² It does

¹⁸ BVerfG 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*). See at 232-234. The *BVerfG* held: 'Handelt es sich . . . um eine typisierbare Fallgestaltung, die eine strukturelle Unterlegenheit des einen Vertragsteils erkennen läßt, und sind die Folgen des Vertrages für den unterlegenen Vertragsteil ungewöhnlich belastend, so muß die Zivilrechtsordnung darauf reagieren und Korrekturen ermöglichen. Das folgt aus der grundrechtlichen Gewährleistung der Privatautonomie (art. 2 Abs. 1 GG) und dem Sozialstaatsprinzip (art. 20 Abs. 1, Art. 28 Abs. 1 GG). . . . Heute besteht weitgehend Einigkeit darüber, daß die Vertragsfreiheit nur im Falle eines annähernd ausgewogen Kräfteverhältnisses der Partner als Mittel eines angemessenen Interessenausgleichs taugt und daß der Ausgleich gestörter Vertragsparität zu den Hauptaufgaben des Zivilrechts gehört. . . . Für die Zivilgerichte folgt daraus die Pflicht, bei der Auslegung und Anwendung der Generalklauseln darauf zu achten, daß Verträge nicht als Mittel der Fremdbestimmung dienen. Haben die Vertragspartner eine an sich zulässige Regelung vereinbart, so wird sich regelmäßig eine weitergehende Inhaltskontrolle erübrigen. Ist aber der Inhalt des Vertrages für eine Seite ungewöhnlich belastend und als Interessenausgleich offensichtlich unangemessen, so dürfen sich die Gerichte nicht mit der Feststellung begnügen: "Vertrag ist Vertrag". Sie müssen vielmehr klären, ob die Regelung eine Folge strukturell ungleicher Verhandlungsstärke ist, und gegebenenfalls im Rahmen der Generalklauseln des geltende Zivilrechts korrigierend eingreifen.'

¹⁹ C.-W. Canaris, 'Grundrechte und Privatrecht', 184 *Archiv für die civilistische Praxis* 3 (1984), 201, in particular, at 210 ff., 225 ff. See also C.-W. Canaris, *Grundrechte und Privatrecht* (Berlin/New York: Walter de Gruyter, 1999).

²⁰ BVerfG 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

²¹ H. Wiedemann, 'Verfassungsrecht. Handelsrecht. Anmerkung', 45 *Juristenzeitung* 14 (1990), 695, at 696.

²² See J. Eschenbach and A.F. Niebaum, 'Von der mittelbaren Drittwirkung unmittelbar zur staatlichen Bevormundung', 13 *Neue Zeitschrift für Verwaltungsrecht* 11 (1994), 1079, in particular, at 1081; W. Zöllner, 'Regelungsspielräume in Schuldvertragsrecht', 196 *Archiv für die civilistische Praxis* 1-2 (1996), 1, at 6, 10-11. On the relationship between the old theory of indirect effect and the new theory of *grundrechtlicher Schutzpflicht* in general see, for instance, G. Hermes, 'Grundrechtsschutz durch Privatrecht auf neuer Grundlage?', 41 *Neue Juristische Wochenschrift* 29 (1990), 1764, at 1765; I. von Münch, 'Die Drittwirkung von Grundrechten in Deutschland', in I. von Münch, P.S. Coderch and J.F. i Riba, *Zur Drittwirkung der Grundrechte* (Frankfurt am Main [etc.]: Peter Lang, 1998), 7, at 24 ff; C. Hillgruber, 'Abschied von der Privatautonomie?', 28 *Zeitschrift für Rechtspolitik* 1 (1995), 6; R. Singer, 'Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst', 50 *Juristenzeitung* 23 (1995), 1133, at 1135-1137.

not seem to be an exaggeration to say that the obligation of the civil courts to protect constitutional rights in the field of contract law leads in practice to the direct applicability of constitutional rights in contractual relationships. This means that contractual parties are in reality bound by constitutional rights and may have a claim or a defence on the basis of a constitutional right, as a result of which private law rules can easily be replaced by constitutional law rules. Accordingly, if both private parties have a claim or a defence on the basis of a constitutional right, *a balance* has to be struck *between the two constitutional rights*, and the role of the general clauses of private law seems to be limited to providing a shelter for this balancing process.

5.2 Balancing competing interests: The right to party autonomy v. the right to party autonomy in conjunction with the principle of the social state?

It can be seen that in the *Bürgschaft* case the weaker party - the daughter of the bankrupt father without sufficient means of subsistence - won a major victory on the basis of her right to party autonomy (Article 2(1) GG) in conjunction with the principle of the social state (Articles 20(1) and 28(1) GG). The question which thereby arises is to what extent the constitutional right to party autonomy can serve the interests of the weaker party to the detriment of the interests of the stronger party - the bank. In other words, how absolute is the protection of the weaker party on the basis of the constitutional right to party autonomy?

It is interesting to note that the reasoning of the *Bundesverfassungsgericht* in the case at hand, expressed in very broad terms, boils down to the following. Normally, contracts must be upheld by the courts as an expression by both parties of their constitutional right to party autonomy. However, in cases where a structural imbalance of bargaining power has led to a contract which is exceptionally onerous for the weaker party, the civil courts are obliged to intervene in order to secure relief for the weaker party. This obligation on the part of the civil courts follows from their duty to guarantee a constitutionally protected right to party autonomy in conjunction with the principle of the social state.²³

²³ BVerfG 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*). See at 231-232. The *BVergG* held: 'Art. 2 Abs. 1 GG gewährleistet die Privatautonomie als "Selbstbestimmung des Einzelnen im Rechtsleben" (*Richsen*, in *Insensee/Kirchhof*, Handbuch des Staatsrechts, Bd. VI, S. 1210 Rdnr. 58). . . . Am Zivilrechtsverkehr nehmen gleichrangige Grundrechtsträger teil, die unterschiedliche Interessen und vielfach gegenläufige Ziele verfolgen. Da alle Beteiligten des Zivilrechtsverkehrs den Schutz des Art. 2 Abs. 1 GG genießen und sich gleichermaßen auf die grundrechtliche Gewährleistung ihrer Privatautonomie berufen können, darf nicht nur das Recht des Stärkeren gelten. Die kollidierenden Grundrechtspositionen sind in ihrer Wechselwirkung zu sehen und so zu begrenzen, daß sie für alle Beteiligten möglichst weitgehend wirksam werden. Im Vertragsrecht ergibt sich der sachgerechte Interessenausgleich aus dem übereinstimmenden Willen der Vertragspartner. Beide binden sich und nehmen damit zugleich ihre individuelle Handlungsfreiheit wahr. Hat einer der Vertragsteile ein so starkes Übergewicht, daß er den Vertragsinhalt factisch einseitig bestimmen kann, bewirkt dies für den anderen Vertragsteil Fremdbestimmung. . . . Allerdings kann die Rechtsordnung nicht für alle Situationen Vorsorge treffen, in denen das Verhandlungsgleichgewicht mehr oder weniger beeinträchtigt ist. Schon aus Gründen der Rechtssicherheit darf ein Vertrag nicht bei jeder Störung des Verhandlungsgleichgewichts nachträglich in Frage gestellt oder korrigiert werden. Handelt es sich um eine typisierbare Fallgestaltung, die eine strukturelle Unterlegenheit des einen Vertragsteils erkennen läßt, und sind die Folgen des Vertrages für den unterlegenen Vertragsteil ungewöhnlich belastend, so muß die Zivilrechtsordnung darauf reagieren und Korrekturen ermöglichen. Das folgt aus der grundrechtlichen Gewährleistung der Privatautonomie (art. 2 Abs. 1 GG) und dem Sozialstaatsprinzip (art. 20 Abs. 1, Art. 28 Abs. 1 GG).'

It follows from this reasoning that both parties - the stronger and the weaker - enjoy a constitutional right to party autonomy. There is, however, a difference in the interpretation of this right by the *Bundesverfassungsgericht* in respect of each of the parties. On the one hand, it appears that the stronger party simply enjoys a constitutionally protected freedom of contract which is derived from the right to party autonomy guaranteed by Article 2(1) *GG*.²⁴ On the other hand, the same constitutional right to party autonomy pertaining to the weaker party, invoked in conjunction with the principle of the social state, entails protection from an extremely burdensome contract which was entered into when exercising a constitutionally protected freedom of contract.²⁵

Thus, we can see that what is at stake in this case is the conflict between the two constitutional rights, more explicitly between the two sides of one constitutional right, i.e. the right to party autonomy which protects the interests of the weaker party on the one hand, and the one which protects the interests of the stronger party, on the other.

5.3 Party autonomy v. party autonomy in conjunction with the principle of the social state: Is there a possibility to strike an appropriate balance?

Since both parties have constitutionally protected rights, which can be invoked as a claim or as a defence if a dispute arises, an appropriate balance should be struck between them. In the case at hand, this balance had to be found between two sides of the right to party autonomy - party autonomy in the sense of freedom of contract and party autonomy in the sense of the right to be protected from an extremely burdensome contract. That this task is not an easy one can already be seen from the broad formulations of the two constitutional rights involved. Accordingly, the interpretation of the general clauses (§ 138(1) and 242 (*BGB*) concerning, respectively, good morals and good faith) on the basis of constitutional rights means, in essence, the interpretation of general clauses of a private law character on the basis of general

²⁴ On the German approach, according to which Article 2(1) of the Basic Law is generally regarded as protecting the freedom of contract; see, for example, O. Nannen, *Grundrechte und privatrechtliche Verträge* (doctoral thesis Trier, 2000), 58, with references to the case law of the German Constitutional Court; W. Höfling, *Vertragsfreiheit. Eine grundrechtsdogmatische Studie* (Heidelberg: C.F. Müller Juristischer Verlag, 1991), 6; Zöllner, 'Die Politische Rolle des Privatrechts', 330; D. Medicus, *Schuldrecht I. Allgemeiner Teil* (München: Verlag C.H. Beck, 2000), 38; J. Schmidt-Salzer, 'Vertragsfreiheit und Verfassungsrecht', 23 *Neue Juristische Wochenschrift* 1-2 (1970), 8, at 10. Compare the discussion in the Netherlands on the nature of the freedom of contract. See Nieuwenhuis, 'Contractvrijheid, een weerbarstig beginsel', in Hartlief en Stolker, *Contractvrijheid*, 23; E.A. Alkema, 'Contractvrijheid als grondrecht. De vrijheid om over grond- en mensenrechten te contracteren of er afstand van te doen', in Hartlief and Stolker, *Contractvrijheid*, 33.

²⁵ Actually, deriving the obligation of the civil courts to protect the weaker party from exceptionally onerous contracts from the constitutional right to party autonomy, which presupposes freedom of action, appears to be highly questionable. See, for instance, H. Wiedemann, 'Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen', 49 *Juristenzeitung* 8 (1994), 411: 'Aus dem Grundrecht auf Handlungsfreiheit kann kein Recht auf Abschluß eines besseren oder auch nur eines angemessenen Vertragsinhalts folgen, erst recht keine Befugnis zur Änderungskündigung, um passable Bedingungen durchzusetzen. . . . Die Handlungsfreiheit garantiert gewiß kein Recht auf Vertragsbruch.' Compare C. Hillgruber, 'Grundrechtsschutz im vertragsrecht', 91 *Archiv für die civilistische Praxis* 1 (1991), 69, at 85: 'Selbstbestimmung ist ohne Selbstverantwortung nicht denkbar, und weil das Prinzip der Eigenverantwortlichkeit den Grundrechten immanent ist, kann es auch keinen Grundrechtsschutz vor sich selbst geben.'

clauses of a public law nature.

The question arises whether the *Bundesverfassungsgericht* in the *Bürgschaft* case managed to provide appropriate criteria for carrying out this kind of balancing between the opposite interests of the two parties, both of which are entitled to protection on the basis of the Constitution. For this purpose, it is necessary to look at the implications which are generally believed to follow from the reasoning of the Court.²⁶

In the German literature there seems to be agreement about the three most important consequences of the *Bürgschaft* case, which are, in particular, pointed out by Wiedemann.²⁷ First, according to the *Bundesverfassungsgericht* the Constitution requires the protection of private parties from themselves. This protection should take place through legislation and judicial decisions.²⁸ Second, it is in accordance with the value system contained in constitutional rights and the principle of the social state that private autonomy in general and contract law in particular should fulfil not only the task of establishing order, but also the task of protection.²⁹ Third, in typical cases of structural inequality between parties the content of every legal transaction is to be scrutinized by civil courts as to its onerousness for the weaker party.³⁰ All kinds of contracts and corporate decisions are open for intervention by the courts. The phrase ‘a contract is a contract’ in isolation cannot provide sufficient legal basis for the binding force of a contract; this is equally true for the phrase ‘a majority is a majority’ with regard to corporate decisions.

All this seems to boil down to the creation by the *Bundesverfassungsgericht* of what Adomeit calls a new general clause which gives a new character to the whole of German civil law.³¹ This new clause can be formulated as follows: ‘A contract which is exceptionally onerous for one of the parties and which is the result of inequality in the bargaining power is void.’³² What is striking is the apparent vagueness of this formulation as it is not clear which concrete criteria are to be used in practice in order to determine whether a contract is in fact void. As Adomeit rightly observes, the classical general clauses of § 138 and 242 of the *BGB*, which caused well-known methodological problems, were much easier to grasp than the new

²⁶ For the most important passages in the judgment of the *Bundesverfassungsgericht* in the *Bürgschaft* case, in which the balancing of competing interests takes place, see notes 18, 23.

²⁷ Wiedemann, ‘Zur verfassungsrechtlichen Inhaltskontrolle von Verträgen’. See also Zöllner, ‘Regelungsspielräume in Schuldvertragsrecht’, 5.

²⁸ See, in particular, Singer, ‘Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst’.

²⁹ Compare Hillgruber, ‘Abschied von der Privatautonomie?’.

³⁰ See also Eschenbach and Niebaum, ‘Von der mittelbaren Drittwirkung unmittelbar zur staatlichen Bevormundung’; Singer, ‘Vertragsfreiheit, Grundrechte und der Schutz des Menschen vor sich selbst’, 1136 ff.; K. Adomeit, ‘Die gestörte Vertragsparität. Ein Trugbild’, 47 *Neue Juristische Wochenschrift* 38 (1994), 2467; G. Spieß, ‘Inhaltskontrolle von Verträgen - das Ende privatautonomer Vertragsgestaltung?’, 109 *Deutsches Verwaltungsblatt* 21 (1994), 1222.

³¹ Adomeit, ‘Die gestörte Vertragsparität. Ein Trugbild’.

³² Ibid., my translation of: ‘Ein Vertrag, der einen der beiden Vertragspartner ungewöhnlich stark belastet und das Ergebnis strukturell ungleicher Verhandlungsstärke ist, ist nichtig.’

clause by which they are now replaced.³³

Moreover, formally, this new clause was created by the *Bundesverfassungsgericht* in an attempt to strike an appropriate balance between the two clashing constitutional rights. To what extent this clause in reality struck an appropriate balance between the two constitutional rights in the present case is, however, rather doubtful as it seems to imply that certain contractual obligations, although they were freely entered into, can be considered to affect one of the contracting parties so seriously in its right to private autonomy in conjunction with the social state that the obligation is contrary to the Constitution and is therefore void. This conclusion means that the scales are no longer wavering between the two constitutional rights of both parties, but rather are considerably tipped in favour of the weaker party while the interests of the stronger party are not properly taken into account. Thus, the new constitutional clause provides a perfect illustration of the fact that the ‘protection of “social rights” and their balancing against other rights such as freedom of contract might very well lead judges to override solutions and principles encoded in other acts, notably in private law codifications, because they do not live up to what the judge regards, i.e. “feels”, as “social” or “socially just”’.³⁴ This is, in fact, the major danger of the top-down approach taken by the *Bundesverfassungsgericht* in the *Bürgschaft* case, i.e. an approach in which justice in a concrete case is imposed from above on the basis of a vague norm of the higher (e.g. constitutional) order which can easily be interpreted by the judge according to his or her own political convictions and not on the basis of the objective criteria which are so important in legal practice. It is this top-down approach which is at stake when the function of the protection of the weaker party is assumed by constitutional rights.

Presumably, guided by a desire to avert this danger - which was created by the reasoning of the *Bundesverfassungsgericht* in the *Bürgschaft* case - the Ninth Civil Senate of the *Bundesgerichtshof* tried to reintroduce clarity into contract law when it had the opportunity to hear the *Bürgschaft* case once again after the case had been returned to it by the *Bundesverfassungsgericht*.³⁵ The *Bundesgerichtshof* held that a legal transaction is only void under § 138(1) if its entire character, resulting from its content, motivation and purpose taken together, offends good morals, for which purpose only those circumstances which prevailed at the conclusion of the contract are to be taken into account.³⁶ *The mere fact that the content of the contract placed a considerable burden on the daughter and only the daughter cannot in itself question the validity of the guarantee.* By operation of law, the content of such a contract will as a rule be a unilateral obligation in favour of the creditor. Generally, the content and purpose of such a contract consist merely in providing the creditor with security for certain claims against the principal debtor. By its structure, the guarantee is

³³ Id., 2467.

³⁴ P. Schlechtriem, ‘The General Clauses in the National Laws: Theory and Practice in Germanic, Dutch and the Scandinavian Legal Systems’, <http://www.secola.org/vortraege/paris/Slechtriem.pdf>, 19-20.

³⁵ BGH 24 February 1994, *Neue Juristische Wochenschrift* 1994, 1341.

³⁶ See BGH 8 December 1982, *Neue Juristische Wochenschrift* 1983, 1851, BGH IX 28 February 1989, *Neue Juristische Wochenschrift* 1989, 1276 and BGH IX 2 November 1995, *Neue Juristische Wochenschrift* 1996, 514.

therefore not characterized by an appropriate and, in principle, equal consideration of mutual interest but, by its legal nucleus, is aimed at providing benefits to one party only. According to the *Bundesgerichtshof*, the Constitution guarantees freedom of contract within the legal framework, which includes the freedom to design the rules of a contract. This forms an important foundation of the present private legal order. It follows from the freedom of contract that a person must generally be free to enter into risky transactions on his or her own responsibility and to take an obligation which can only be performed under particularly favourable circumstances. At the same time, the *Bundesgerichtshof* pointed out that the freedom of contract, which enjoys protection as a basic right, can only justify the conclusion of risky and yet unilaterally burdensome contracts if both parties are in a position to decide freely in favour of or against being bound by a contract. As this was not the case in the *Bürgschaft* situation because the bank did not inform the daughter about the inherent risks of providing surety, the *Bundesgerichtshof* held that the contract was contrary to good morals (§ 138(1)) and was therefore void.

6. The *O'Brien* and *Van Lanschot Bankiers v Bink* cases: A bottom-up approach by the English House of Lords and the Dutch Supreme Court

As was mentioned above, the English House of Lords and the Dutch Supreme Court in the two other cases - the facts of which were quite similar to the German *Bürgschaft* case - arrived at the same result as the *Bundesverfassungsgericht*, i.e. protection of the weaker party. What was entirely different, however, was the reasoning by which the same result was attained.

As was the case with the *Bundesverfassungsgericht*, the House of Lords in the *O'Brien* case was also concerned with striking an appropriate balance - in this case, however, not between opposing constitutional rights, but between the opposite interests of the two parties. One can clearly see this from the policy considerations provided by Lord Browne-Wilkinson. According to him,

... although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal ... In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.³⁷

At the same time, however, Lord Browne-Wilkinson emphasized the importance of keeping a sense of balance in deciding what degree of protection should be afforded. As he put it:

It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest, viz. the need to ensure that the wealth currently tied in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to

³⁷ [1994] 1 AC 180 at 188.

accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions.³⁸

Starting out from these considerations, in his judgment Lord Browne-Wilkinson established the following principles for dealing with situations where one cohabitee has entered into an obligation to stand as surety for the debts of the other cohabitee and the creditor is aware that they are cohabitees:

- (1) The surety obligation will be valid and enforceable by the creditor (in the present case, the bank) unless the suretyship was a result of the undue influence, misrepresentation or other legal wrong of the principal debtor (in the present case, the husband).
- (2) If there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the creditor has taken reasonable steps to satisfy himself that the surety (in the present case, the wife) entered into the obligation freely and in the knowledge of the true facts, the creditor will be unable to enforce the surety obligation because he will be fixed with constructive notice of the surety's right to set aside the transaction; a creditor is put on inquiry by the combination of two factors, namely, when: (a) the transaction is on its face not to the financial advantage of one of the cohabitees;³⁹ and (b) there is a substantial risk in transactions of that kind that, in procuring one cohabitee to act as surety, the other has committed a legal or equitable wrong that entitles the wife to set aside the transaction;
- (3) unless there are special exceptional circumstances, a creditor will have taken such reasonable steps to avoid being fixed with constructive notice if the creditor warns the surety at a private meeting not attended by the principal debtor of the amount of her potential liability and of the risks involved and advises the surety to take independent legal advice.

The importance of this judgment by the House of Lords lies in the fact that it *per se* boils down to the establishment of the new general duty to inform, which is contrary to the basic principle of English law as laid down in the *Smith v Hughes* case.⁴⁰ Under that principle,

even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is no fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.⁴¹

³⁸ [1994] 1 AC 180 at 188.

³⁹ The importance of this requirement is illustrated in *CIBC Mortgages Plc v Pitt* [1994] AC 200, to which the *O'Brien* doctrine was immediately applied. In that court case, although it was established that there was undue influence by a husband on a wife in order to secure the execution of a charge over the matrimonial home, the charge was not held to be invalidated. The reason for this was that the transaction was to the wife's advantage.

⁴⁰ *Smith v Hughes* (1871) LR 6 QB 597 at 603. See J. Cartwright, 'Taking Stock of O'Brien', 7 *Restitution Law Review* (1999), 1, at 17-18.

⁴¹ *Smith v Hughes* (1871) LR 6 QB 597 at 607.

This development within English private law demonstrates its ability to react to new situations and to strike a fair balance between, on the one hand, the vulnerability of the weaker party and, on the other, the practical problems of financial institutions asked to accept a surety obligation without recourse to broad norms embodied in the European Convention on Human Rights.⁴² In this case, one can speak of a bottom-up approach, i.e. an approach when justice in a concrete case is found on the basis of technical rules of private law without having recourse to the broader principles of a higher (e.g. constitutional) order.

Moreover, in his judgment Lord Browne-Wilkinson tried to offer a solution which would clarify for the banks which steps should be taken by them in order not to be fixed with a constructive notice of misrepresentation and to be able to enforce the charge.⁴³ It is rather questionable to what extent the constitutional rights which were involved in the *Bürgschaft* case could be of assistance in order to give at least such clarity. Even if it were constitutional rights that would be balanced against each other in order to arrive at a fair solution in a concrete dispute, one would inevitably need to go down to the level of sharper norms which are provided by private law. The reason for this is that private law norms mostly implement the same values of the whole legal order that in most legal systems have been implemented in constitutional rights. The only difference lies in the fact that in private law these values have been implemented in view of horizontal relations, i.e. the relation between private parties, and not in view of vertical relations in which at least one of the parties is a state. Therefore, private law norms are much more suitable for application in contractual relations.

The bottom-up approach to the protection of the weaker party is also illustrated by the *Van Lanschot Bankiers v Bink* case,⁴⁴ in which the Dutch Supreme Court, though in far less detailed terms than the House of Lords, held that the bank as a professional credit provider is obliged to inform a non-professional party, who is eager to provide surety because of its

⁴² The Convention was incorporated into English law by means of the Human Rights Act of 1998.

⁴³ It should be noted that the application of the *O'Brien* principles gave rise to some problems which were addressed by the House of Lords in *Royal Bank of Scotland v Etridge (No. 2)* [2001] 4 ALL ER 449. In that case, the House of Lords sought to lay down clearer guidelines for the application of the doctrine. In particular, it held that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts (or vice versa) because on its face such a transaction is not to the wife's financial advantage and there is a substantial risk that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction. These two factors do not have to be proved in each case before the bank is put on inquiry. Moreover, in future, banks should regulate their affairs on the basis that they are put on inquiry in each case where the relationship between the surety and the debtor is non-commercial. The creditor must always take reasonable steps to bring home to the individual guarantor the risks that he is running by standing as surety. The bank, however, is not required to discharge that obligation by means of a personal meeting with the wife, provided that a suitable alternative is available. Usually, it will be reasonable for the bank to rely upon confirmation from a solicitor, acting for the wife, that he has advised her appropriately. In this way, the onus has been shifted to the legal adviser.

⁴⁴ HR 1 June 1990, *NJ* 1991, 759.

personal relationship with the debtor, of the risks inherent therein.⁴⁵ The real question, which arises in this respect, is how far this duty to inform extends, in particular whether the bank can limit itself to a general explanation of the liability of a surety if the debtor is not able to pay his debts, or whether the bank should particularly focus on the perspectives of the undertaking on which the debtor wants to spend the money borrowed from the bank.⁴⁶ It appears that resorting to constitutional rights, which protect the interests of both the stronger and the weaker party, is of no great assistance in answering this question.

7. Conclusion

The fact that the same degree of protection of the weaker party can be ensured on the basis of constitutional rights, as in the *Bürgschaft* case, as well as on the basis of concepts which are already well established in contract law, as in the *O'Brien* and the *Van Lanschot Bankiers v Bink* cases, shows that it is not entirely obvious that the constitutionalization of contract law in every case constitutes something more than a mere transformation of private law issues into constitutional law issues. The same problems connected with striking the right balance between the opposite interests of the two parties come into play as a result of the top-down approach when constitutional rights are balanced against each other and as a result of the bottom-up approach when the balancing takes place at the level of private law concepts. The rhetorical strength of a constitutional right as a means of protecting the weaker party is considerably undermined as a consequence of the need to balance it with another constitutional right - that of the stronger party. Moreover, the abstract nature of constitutional rights, which can be seen in two different interpretations given to the right to party autonomy, makes it extremely difficult to strike an appropriate balance between them and to establish clear criteria which would explain how the judges arrived at this very solution in this particular case. As a result of the priority of the 'socially just' outcome over the clear judicial reasoning, there is a serious danger of arbitrary decisions and disastrous consequences for legal certainty.

Accordingly, if the aim of the constitutionalization of contract law is the protection of the weaker party, constitutional rights do not need to replace contract law concepts which already seem to be in conformity with the Constitution and provide much sharper criteria for striking a balance between the opposite interests of the parties, taking into account their differences in bargaining power. In other words, in cases where mechanisms already exist in contract law which in essence give a more concrete definition to constitutional rights simply without explicitly saying so, the need for their substitution by constitutional notions is quite dubious as it will lead to the same problems which have already been solved in contract law.

The rhetorical strength of constitutional rights could only be valuable for the protection of the weaker party if there were absolute rights which could be invoked by it and

⁴⁵ For comments on this decision, see J.B.M. Vranken, 'De onderlinge verhouding van partijen. Professionaliteit en deskundigheid', 121 *Weekblad voor privaatrecht, notariaat en registratie* 5974 (1990), 583; HR 1 June 1990, *NJ* 1991, 759 with note by CJHB, 3303.

⁴⁶ See HR 1 June 1990, *NJ* 1991, 759 with note by CJHB, 3303.

did not have to be balanced by the constitutional right of the stronger party, i.e. freedom of contract. Unless the latter is completely abolished, which is not very likely to happen in the near future, it is highly questionable whether the constitutionalization of contract law by means of such constitutional rights as human dignity or party autonomy is indeed something new under the sun and, above all, something which is beneficial for the protection of the weaker party.